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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

LA FUERZA AEREA BOLIVIANA,
An Instrumentality of the
REPUBLIC OF BOLIVIA,
A Foreign State,
Petitioner,

v.

TRANSAERO, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a foreign sovereign entitled to interlocutory review of its claim that it is not amenable to suit under the Foreign Sovereign Immunities Act?

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this Case on November 6, 1996, and further prays that this Court summarily reverse the judgment of the Second Circuit.

OPINIONS BELOW

The opinion of the District Court is unreported and is reproduced in the Appendix at 10a. The opinion of the Court of Appeals dismissing the appeal for lack of appellate

jurisdiction is reported at 99 F.3d 538 and is reproduced in the Appendix at 1a.

JURISDICTION

The order of the United States District Court for the Eastern District of New York was entered on August 4, 1995. The judgment of the United States Court of Appeals for the Second Circuit was entered on November 6, 1996. A timely petition for rehearing and suggestion for rehearing en banc was denied on January 9, 1997 (App. 8a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case addresses the immunity of foreign sovereigns under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611. The relevant provisions of the Act—§§ 1602, 1603, 1604, and 1608—are reproduced in the Appendix at 35a-39a.

STATEMENT OF THE CASE

In 1981 and 1982, La Fuerza Aerea Boliviana—the Bolivian Air Force—purchased $598,115.76 in aviation equipment from the respondent, Transaero, Inc. A one paragraph credit agreement drafted by Transaero provided for interest of 1.75% per month (a rate of 21% per annum) on purchases not paid for within 120 days of shipment.

The Air Force does not dispute that its payments were late. The delay is attributable, at least in part, to the political and economic chaos that afflicted Bolivia in the early 1980s. During the period in which Transaero sold its products to the Air Force, for example, Bolivia was ruled by three successive military governments. In October 1982, Bolivia regained a civilian government, but the country remained in turmoil. The economy collapsed; payments to

foreign creditors were suspended; and inflation soared to a yearly rate of 28,000% for the first nine months of 1985.

In the midst of these difficulties, the Government of Bolivia sought to satisfy its debt to Transaero. On October 30, 1984, the Air Force paid Transaero $381,688.29 against the outstanding balance, leaving $216,427.47 in unpaid principal. In December 1985, the Air Force entered into negotiations aimed at settling the account. The Economic Counselor at the U.S. Embassy in La Paz negotiated on behalf of Transaero, and the Bolivian Ministry of Finance negotiated on behalf of the Air Force. Bolivia offered to pay the balance of the principal ($216,427.47) plus an additional $50,000 to compromise the accrued interest. Transaero accepted the offer and the Air Force made the payment on January 6, 1986, thinking it had settled the matter.

Five months later, Transaero demanded payment of an additional $626,565.27 in interest, including interest that purportedly had accrued since the settlement. The Air Force declined to pay this sum.

On September 8, 1988, Transaero filed suit in the Eastern District of New York, seeking $983,696.60 in allegedly unpaid principal and interest—even though Bolivia already had paid the principal in full.[1]

Transaero served the Complaint by registered mail sent to an office address in La Paz and did not comply with 28 U.S.C. § 1608(a)'s requirements for service on foreign states

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[1] The Complaint was filed more than 6 years after the Air Force's last purchase of equipment. See N.Y. U.C.C. Law § 2-725(1) (four-year statute of limitations on sales of goods).

or their political subdivisions.[2] The Air Force did not appear to defend the case, and the District Court entered a default judgment against it on April 28, 1989, in the amount of $983,696.60.

In June 1992, Transaero registered and sought to enforce the judgment in the District Court for the District of Columbia. The Air Force moved to dismiss the proceedings, arguing that the Eastern District of New York had lacked personal and subject matter jurisdiction because Transaero had not complied with the service requirements of 28 U.S.C. § 1608(a). In an unreported decision issued on September 25, 1992, the District Court denied the motion and ruled that service was properly made under 28 U.S.C. § 1608(b) because the Bolivian Air Force was merely an "agency or instrumentality" of the government of Bolivia.

The Air Force filed an interlocutory appeal with the Court of Appeals for the District of Columbia Circuit. While the appeal was pending, the Air Force asked the Eastern District of New York to set aside the default judgment on the ground that it had been procured by fraudulent misrepresentations.[3] The court denied the motion.

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[2] In subsequent proceedings, the highest ranking member of the Bolivian Air Force declared under penalty of perjury that the Air Force did not learn of Transaero's suit until February 1992. See App. 33a-34a.

[3] The Air Force's counsel believed it had a duty of professional responsibility to raise the issue of fraud once it became aware of the issue, and to do so "in the very court that rendered the judgment." *Weldon v. United States*, 70 F.3d 1, 4 (2d Cir. 1995). In its moving papers, the Air Force maintained its claim that the District Court lacked subject matter jurisdiction and expressly preserved its jurisdictional defense under the Foreign Sovereign Immunities Act—*i.e.*, that the plaintiff had failed to comply with the Act and that the District Court's default judgement was void and unenforceable—which were issues on appeal at that moment before the D.C. Circuit. See App. 30a-31a.

The Second Circuit affirmed but remanded for the purpose of "assessing the factual accuracy" of Transaero's interest claims and, "if necessary, recalculating the award." *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 24 F.3d 457, 463 (2d Cir. 1994). In a petition for rehearing, the Air Force sought a stay of the mandate until the D.C. Circuit ruled on jurisdiction.

Two months later, the D.C. Circuit ruled that the Bolivian Air Force was a "foreign state or political subdivision" of the Republic of Bolivia, and that Transaero had not met the service requirements of 28 U.S.C. § 1608(a). *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994). The court concluded, "The Eastern District of New York lacked personal jurisdiction, and the default judgment registered in the District of Columbia was therefore void and unenforceable." *Id.* at 154. This Court denied Transaero's petition for a writ of certiorari. 115 S. Ct. 1101 (1995).

After learning of the D.C. Circuit's decision, the Second Circuit issued an opinion on rehearing. While noting that, "[a]t oral argument on the appeal, both sides took the position that the adequacy of the notice that initiated the Eastern District suit would be resolved by the then-pending appeal in the D.C. Circuit," the court refused to take any action as a result of the D.C. Circuit's ruling:

> [W]ithout expressing any views as to (a) the validity of Transaero's service upon BAF in initiating the Eastern District suit or (b) whether the default judgment is impaired by the allegedly late notice of its entry, we decline to grant the petition for rehearing just because the D.C. Circuit has ruled that the default judgment is not enforceable in the District of Columbia. We need not decide whether BAF is entitled to pursue a new Rule 60(b) motion in the Eastern

> District, now that the D.C. Circuit has declared the default judgment to be void.

Transaero, Inc. v. La Fuerza Aerea Boliviana, 38 F.3d 648, 649-50 (2d Cir. 1994).

Following the Second Circuit's suggestion and in reliance upon the D.C. Circuit's ruling, the Air Force filed a motion in the Eastern District of New York to set aside the default judgment and dismiss the Complaint. The District Court denied the motion, ruling that the Air Force had waived the claim because "[a]t no time . . . did the Air Force object to the lack of personal jurisdiction." App. 18a. In a Motion for Reconsideration, the Air Force directed the court's attention to its express preservation of its jurisdictional defenses, but the court denied the motion in a single sentence. App. 28a.

The Air Force sought to take an interlocutory appeal to protect its immunity, but the Second Circuit dismissed the appeal for lack of jurisdiction. *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 99 F.3d 538 (2d Cir. 1996); App. 1a. The court recognized that "the right not to be sued at all" may be lost if there is no provision for interlocutory review, *id.* at 541; App. 6a, but held that the Bolivian Air Force did not possess such immunity. Instead, the court characterized the Air Force's immunity, if any, as the right "not to be subject to a binding judgment," and ruled:

> Because BAF's right not to be subject to a binding judgment may be effectively vindicated following final judgment, the denial of the claim of lack of jurisdiction is not an immediately appealable collateral order.

Id.; App. 7a.[4]

REASONS FOR GRANTING THE WRIT

This case presents a single issue: whether a foreign sovereign is entitled to immediate interlocutory review of a district court's denial of the sovereign's claim that it is not amenable to suit under the Foreign Sovereign Immunities Act. The Bolivian Air Force does not seek a ruling from this Court on the merits of its claim; it seeks only the right to have that claim heard on interlocutory review before it is subjected to further proceedings in the district court.

The Second Circuit's ruling that foreign sovereigns have no right to immediate interlocutory review of a denial of immunity under the Foreign Sovereign Immunities Act creates a conflict among the circuits over the nature of foreign sovereign immunity and the availability of interlocutory review for denials of that immunity, undercuts the Act's purpose of creating a uniform body of federal law on the issue of foreign sovereign immunity, and effectively strips a foreign sovereign of the immunity from suit guaranteed to it by the Act. Petitioner asks that this Court exercise its power to undo these errors by granting the petition for writ of certiorari and summarily reversing the decision of the Second Circuit.

I. THE SECOND CIRCUIT IS IN CONFLICT WITH OTHER CIRCUITS ON THE NATURE OF FOREIGN SOVEREIGN IMMUNITY AND THE AVAILABILITY OF INTERLOCUTORY REVIEW.

The Second Circuit failed to recognize that the immunity granted to foreign sovereigns under the Foreign Sovereign Immunities Act is immunity from the jurisdiction of U.S.

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[4] In both its ruling and its denial of rehearing, the Second Circuit ignored the Air Force's alternative request for mandamus relief.

courts, *i.e.*, that sovereign immunity is not merely immunity from judgment but also immunity from suit. The Second Circuit's contrary ruling on that point led to the equally erroneous conclusion that a foreign sovereign-in this case, the Bolivian Air Force—has no right to interlocutory review of a denial of immunity. Both rulings conflict with the decisions of every other circuit to address these issues. Because of the importance of these issues—and to resolve these conflicts—this Court should grant certiorari.

A. Foreign Sovereign Immunity Is Immunity From Suit.

The Second Circuit made the threshold mistake of treating the Bolivian Air Force no differently than it would an ordinary private litigant. In fact, the Air Force is a "foreign state" within the meaning of 28 U.S.C. § 1603. See *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151-53 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1101 (1995). As a result, Transaero can only overcome the Air Force's claim of immunity by complying with the requisite service of process provisions in the Foreign Sovereign Immunities Act. See 28 U.S.C. § 1608(a). Transaero failed to comply with those provisions when it served the Air Force with its Complaint. Accordingly, the District Court did not have subject matter jurisdiction over the Air Force *ab initio*.

The Foreign Sovereign Immunities Act "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). The language of the statute, in turn, is crystal clear: "a foreign state *shall be immune from the jurisdiction of the courts of the United States* . . . except as provided." 28 U.S.C. § 1604 (emphasis added); see also 28 U.S.C. §§ 1602, 1605. This Court has made clear that the language of the statute means exactly what it says: "Under the Act, a foreign state is

presumptively immune from the jurisdiction of United States courts." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (emphasis added); see *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983) (the Act "comprehensively regulat[es] the *amenability* of foreign nations to suit in the United States") (emphasis added).

For that reason, "[a]t the threshold of every action in a district court against a foreign state," the court must make an affirmative determination that it has personal and subject-matter jurisdiction. *Id.* at 493-94.

With the conspicuous exception of the Second Circuit in this case, every Circuit that has addressed the issue agrees that foreign sovereign immunity "is an immunity from suit rather than a mere defense to liability; it is effectively lost if a case is erroneously permitted to go to trial." *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354, 1358 (9th Cir. 1988).[5] The Second Cir-

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[5] See *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990) ("'sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits'"); *Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1281 (3d Cir. 1993) ("we adopt the prevalent view that sovereign immunity is an immunity from trial and the attendant burdens of litigation on the merits, and not just a defense to liability on the merits"), *cert. denied*, 114 S. Ct. 2101 (1994); *Stena Rederi AB v. Comision de Contratos del Comite*, 923 F.2d 380, 385 (5th Cir. 1991) ("the FSIA 'is an immunity from suit rather than a mere defense to liability; it is effectively lost if a case is erroneously permitted to go to trial'"); *Gould Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988) ("sovereign immunity is immunity from suit, not just from liability"); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987) ("'sovereign immunity in modern international law . . . promote[s] the functioning of all governments by protecting a state from the burdens of defending law suits abroad which are based upon its public acts'") (quoting testimony of the State Department Legal Advisor). See also *The*

cuit's contrary decision—unlimited by any qualifying or distinguishing language—raises the possibility of other circuits following its lead, thereby throwing the law of foreign sovereign immunity into even greater turmoil.

The Second Circuit based its holding that foreign sovereign immunity consists only of the right "not to be subject to a binding judgment," 99 F.3d at 541; App. 7a, on this Court's decision in *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988). But the petitioner in *Van Cauwenberghe* was a private person, a Belgian real estate broker accused of fraud who asserted an immunity from service of process under the doctrine of specialty. *Id.* at 525. This Court held that he had no immunity from suit, and that his rights could be vindicated on an appeal after final judgment. *Id.* at 525-26. In so doing, however, this Court distinguished between two kinds of immunity—"a right not to stand trial" at all, and a right to prevail at trial. *Id.* at 524. Van Cauwenberghe asserted the second kind of immunity, while the Bolivian Air Force is entitled to the first by statute.

That is how the Seventh Circuit interpreted *Van Cauwenberghe* in *Pullman Construction Industries, Inc. v. United States*, 23 F.3d 1166, 1169 (7th Cir. 1994). In fact, the Seventh Circuit explicitly cited the Foreign Sovereign Immunities Act as an example of immunity from suit. See *id.* ("The eleventh amendment and the FSIA create genuine rights not to be sued in federal court."). The Second Circuit's reading of *Van Cauwenberghe* thus creates an additional conflict among the circuits over the meaning of that decision.

Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.) (sovereigns are equal entities under international law and have no authority over one another).

The Bolivian Air Force asked the District Court to vacate the default judgment, based on the assumption that the D.C. Circuit's opinion was binding with respect to the jurisdictional issues that it decided. The denial of that motion is not only a refusal to accord the proper *res judicata* effect to the decision of a U.S. Court of Appeals; it is also—at its very core—a denial of the Air Force's claim that it is not amenable to suit under the Act and a finding that U.S. courts have jurisdiction over the Bolivian Air Force *whether or not* Transaero complied with the requirements of the Act. The District Court's assertion of jurisdiction—in the face of the D.C. Circuit's finding to the contrary—denies to the Bolivian Air Force the immunity from suit that is guaranteed to it by the Foreign Sovereign Immunities Act.

B. A Foreign Sovereign Is Entitled To Interlocutory Review When A District Court Denies Its Claim Of Immunity.

The District Court's disregard for the D.C. Circuit's ruling and its assertion of jurisdiction over the Bolivian Air Force were simple, clear-cut errors of law, and the Air Force noticed an interlocutory appeal seeking a review and correction of that decision. But the Second Circuit compounded the error by ruling that the District Court's assertion of jurisdiction over a foreign sovereign is not an appealable interlocutory order. The Second Circuit rested its ruling on the assertion that the immunity of foreign sovereigns "may be effectively vindicated following final judgment." 99 F.3d at 541; App. 7a.

The Second Circuit's decision to deny a foreign sovereign an interlocutory review on this issue conflicts with every other circuit to consider the issue. Prior to the Second Circuit's decision, there was unanimity that threshold determinations of jurisdiction—that is, whether a foreign sovereign is immune from suit—are immediately subject to

interlocutory appeal.[6] The D.C. Circuit reached the same conclusion in this very case. See *Transaero*, 30 F.3d at 149-150. Although this Court has never ruled on the issue explicitly, it has heard at least one foreign sovereign immunity case on interlocutory review. See *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).

It is not just in the context of foreign sovereigns that denials of immunity from suit are subject to interlocutory review. Denials of Eleventh Amendment immunity are also subject to interlocutory review. See *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). So, too, are denials of individual officials' claims of absolute and qualified immunity, see *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), both after a motion to dismiss and after summary judgment, see *Behrens v. Pelletier*, 116 S. Ct. 834 (1996). The Second Circuit's decision flies in the face of these precedents as well. In fact, this case is almost indistinguishable from *Metcalf & Eddy*; in both cases, the Court of Appeals denied interlocutory review of immunity claims and created a conflict with every other circuit to address the issue. This Court should apply *Metcalf & Eddy* and summarily reverse the Second Circuit.

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[6] See *Foremost-McKesson*, 905 F.2d at 439, 443 (D.C. Cir. 1990); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 814 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 532 (5th Cir. 1992) ("the interlocutory denial of a claim of foreign sovereign immunity is appealable under the collateral order doctrine"), *cert. denied*, 506 U.S. 956 (1992); *Stena Rederi AB*, 923 F.2d at 384 (5th Cir. 1991); *Gould Inc.*, 853 F.2d at 450-51 (6th Cir. 1988); *Segni*, 816 F.2d at 347 (7th Cir. 1987) ("A foreign government should not be put to the expense of defending [a] lawsuit without an opportunity to obtain an authoritative determination of its amenability to suit at the earliest possible opportunity."); *Compania Mexicana de Aviacion*, 859 F.2d at 1356 (9th Cir. 1988).

Even if this were an open issue, an independent application of the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), would demonstrate that the Courts of Appeals have appellate jurisdiction over a district court's denial of foreign sovereign immunity. As this Court has said:

> To fall within the [Cohen] exception an order must satisfy three conditions: It must "conclusively determine the disputed question," "resolve an important issue completely separate from the merits of the action," and "be effectively unreviewable on appeal from a final judgment."

Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 431 (1985) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). All three criteria are satisfied here.

First, the Order conclusively determines a disputed question. By denying the Bolivian Air Force's motion, the District Court, in effect, barred it from asserting the immunity from suit codified in the Foreign Sovereign Immunities Act. That determination is conclusive because the necessary result of that court's ruling is to require the Air Force to defend itself in court—thus ending the Air Force's immunity. See *Metcalf & Eddy, Inc.*, 506 U.S. at 145 (denials of immunity from suit "purport to be conclusive determinations").

Second, the Order effectively resolves an important issue —whether the Bolivian Air Force is amenable to suit under the Act—that is completely separate from the merits of the action. This issue has nothing to do with the Air Force's liability, if any, on the merits. See *id.*

Third, the District Court's denial of the Bolivian Air Force's immunity is effectively unreviewable on appeal from a final judgment. Contrary to the Second Circuit's assertion,

it is not just the question of the Air Force's "right not to be subject to a binding judgment," 99 F.3d at 541; App. 7a, that is at stake; it is the Air Force's right under federal and international law not to be sued at all. See pp. 8-11, *supra*.

The District Court's Order allows the lawsuit against the Air Force to go forward and forces the Air Force to defend itself in a court that has no personal or subject matter jurisdiction over it. That result is "effectively unreviewable on appeal." See *Metcalf & Eddy, Inc.*, 506 U.S. at 145 (immunity from suit "is for the most part lost as litigation proceeds past motion practice"). By the time the District Court enters its "final order" in this matter, the immunity from suit that was guaranteed to the Air Force by international law and by the Foreign Sovereign Immunities Act, and that was recognized by the D.C. Circuit, will have been shattered. See *Bryant v. Sylvester*, 57 F.3d 308, 316 (3d Cir. 1995) ("failure to afford immediate appeal" renders asserted immunity "worthless"), *vacated on other grounds*, 116 S. Ct. 899 (1996); *Federal Ins. Co.*, 12 F.3d at 1282 ("providing review only after trial would destroy the legal and practical value of [defendants' foreign] sovereign immunity defense"); *United States v. Moats*, 961 F.2d 1198, 1203 (5th Cir. 1992) ("the risk of harm from having to defend the lawsuit remains constant and is an irreparable loss"); *McSurely v. McClellan*, 697 F.2d 309, 317 & n.13 (D.C. Cir. 1982) (compelling defendant to litigate before denial of immunity claim is reviewed on appeal is an "irretrievable loss of immunity from suit"). No court will be able to restore the Air Force's immunity.[7]

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[7] The Second Circuit's reliance on *Richardson-Merrell*, 472 U.S. 424, see 99 F.3d at 541; App. 7a—a suit entirely between private parties with no claim of immunity of any kind—completely misses the point. It is not the mere expense of litigation of which the Bolivian Air Force complains. It is the irrevocable denial of its immunity from suit that is at issue. The

In sum, a district court's denial of foreign sovereign immunity meets the requirements of the collateral order doctrine. The Second Circuit's refusal to hear the Bolivian Air Force's appeal on this issue creates a needless and harmful conflict with the decisions of other circuits and raises the possibility of further applications of this misguided holding, both in the Second Circuit and in the other circuits that have yet to address the issue.

II. THE SECOND CIRCUIT HAS UNDERMINED THE UNIFORMITY OF FEDERAL LAW THAT WAS THE EXPRESS PURPOSE OF THE FOREIGN SOVEREIGN IMMUNITIES ACT.

Congress enacted the Foreign Sovereign Immunities Act with the express purpose of creating a uniform body of federal law on the substantive and procedural issues relating to foreign sovereign immunity. The Second Circuit's ruling undercuts that uniformity by creating conflict among the circuits, and raises the possibility that other circuits that have not addressed these issues will follow suit or will craft their own rules, further undermining the purpose of the Act.

This Court has recognized that Congress passed the Act to "reduc[e] the potential for a multiplicity of conflicting results" on issues relating to foreign sovereign immunity. *Verlinden B.V.*, 461 U.S. at 497. The legislative history evidences this concern on the part of Congress. Thus, the House report on the Act declares that "broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H.R. Rep. No. 94-1487 at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611; see

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Air Force has a right not to be subject to any further delay or expense in the vindication of its immunity.

also *id.* at 32, 1976 U.S.C.C.A.N. at 6631. Numerous lower courts also have recognized uniformity of decision as a chief purpose of the Foreign Sovereign Immunities Act. As the Third Circuit has observed,

> enactment of the FSIA was in response to unique policy considerations touching on the international relations of the United States [such as] Congress' deliberate intent to circumvent much of the potential for interference with the federal government's foreign relations caused by lack of uniformity and local bias in civil caselaw . . . .

In re Texas Eastern Transmission Corp. PCB Contamination Insurance Coverage Litigation, 15 F.3d 1230, 1239 (3d Cir. 1994).[8]

The Second Circuit appears to have been unaware of Congress' desire for uniformity in the application of the Foreign Sovereign Immunities Act. Certainly, its decision has the result of undermining this purpose. This Court should grant certiorari, summarily reverse the Second Circuit, and thereby restore uniformity to the law of foreign sovereign immunity.

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[8] See also *In re Surinam Airways Holding Co.*, 974 F.2d 1255, 1259 (11th Cir. 1992); *In re Air Crash Disaster Near Roselawn*, 96 F.3d 932, 937 (7th Cir. 1996) ("Congress sought to promote uniformity in cases involving foreign governments"); *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 420 (5th Cir. 1982) (Wisdom, J.) ("Congress chose to treat jurisdiction of actions against foreign sovereigns in a uniform and comprehensive manner."); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 879 (4th Cir. 1981) ("Both the statutory language and the legislative history evince the congressional desire to achieve uniformity of decisional law in the area of suits against foreign sovereigns."), *cert. denied*, 455 U.S. 982 (1982); 14 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3662, at 394 (2d ed. 1985) (Congress intended to create uniformity of decision in actions involving foreign governments).

III. THE SECOND CIRCUIT'S DECISION CREATES UNCERTAINTY FOR FOREIGN SOVEREIGNS AND THUS HAS SIGNIFICANT FOREIGN POLICY IMPLICATIONS.

The Second Circuit's decision subjects the Bolivian Air Force—which has been found by the District of Columbia Circuit to be a foreign sovereign—to the jurisdiction of U.S. courts in violation of the Foreign Sovereign Immunities Act, and further allows the imposition on that sovereign of an exorbitant money judgment to which the Air Force has substantial defenses that it had no opportunity to raise.

But the damage from the Second Circuit's ruling goes beyond the harm that it will cause to the Republic of Bolivia. As we have said, the issue for this Court is not whether the Bolivian Air Force's claim of immunity is valid. Rather, the issue is how the federal courts will treat a claim of immunity by a foreign sovereign after a district court decides that such a claim is invalid. Whether a foreign sovereign's immunity should be erased before an appeals court can review and, if necessary, correct the district court's decision is a question with profound implications for the power of federal courts over foreign sovereigns.

For example, if the Second Circuit's decision is allowed to stand, a plaintiff's choice of forum could be the determinant of a foreign sovereign's amenability to suit. Such a result would create uncertainty for foreign sovereigns as to the nature and extent of their immunity in U.S. courts, an uncertainty that itself has substantial foreign policy implications.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted and the decision of the Second Circuit should be summarily reversed.

Respectfully submitted,

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